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Nos. 89-628 & 89-640

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

and

MANUEL LUJAN, JR., *et al.*,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF AMERICAN FARM BUREAU FEDERATION AND WYOMING FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Farm Bureau Federation (AFBF) and Wyoming Farm Bureau Federation (WYFB) hereby

respectfully move to file the attached brief *amicus curiae* in support of Mountain States Legal Foundation and Manuel Lujan petitioners for *certiorari* in the above captioned case. The consents of the attorneys for the petitioners have been obtained. The consent of the attorney for the respondent was requested but denied.

The interest of the Farm Bureau in this case arises from the fact that many Farm Bureau members in the western states are adversely affected by restrictions on land managers imposed in the case at bar. Additionally, Farm Bureau members have been adversely impacted by litigation challenging government programs and policies in other areas including public land grazing administration, argricultural chemical regulation and water regulation.

The AFBF is the largest general farm organization in the United States. It has member state organizations in all 50 states (including Wyoming) and Puerto Rico, representing the interests of more than 3.6 million member families. The interests of AFBF and WYFB should be considered by this Court in making the decision to grant the petitioned writ.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF AMERICAN FARM BUREAU FEDERATION AND WYOMING FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

The American Farm Bureau Federation and Wyoming Farm Bureau Federation respectfully submit this brief

amicus curiae in support of Mountain States Legal Foundation and Manuel Lujan, petitioners for *certiorari*.

INTEREST OF AMICUS CURIAE

1. The American Farm Bureau Federation (AFBF) of Park Ridge, Illinois is a nonprofit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the country. The largest general farm organization in the United States, AFBF, has member state organizations in all 50 states (including Wyoming) and Puerto Rico, representing the interests of more than 3.6 million member families.

2. The Wyoming Farm Bureau Federation (WYFB) is a voluntary, non-profit, general farm organization incorporated under the laws of the State of Wyoming, representing more than 8,000 families. Its purpose is to represent, service and protect the interests and rights of farmers and ranchers in Wyoming.

3. Farm Bureau members have a direct and vital interest in the outcome of this case. The orderly management and use of federal lands, especially in the western region of the United States, is of paramount importance to member farmers and ranchers whose private lands lie adjacent to and are often tied economically to such federal lands.

STATEMENT OF THE CASE

Amicus Curiae adopts petitioners' statements of the case.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' STANDING RULE ALLOWS SERIOUS DISRUPTION OF GOVERNMENT PROGRAMS UPON WHICH FARM BUREAU MEMBERS MUST RELY

The Court of Appeals' decision is the latest of a long series of suits in which parties with the slightest interest in a problem claim standing to judicially challenge far reaching government programs. The result has been serious disruption and potential devastation for those that rely on the programs.

Of major importance to the Farm Bureau's Western Region members is the public lands grazing program. For generations families have built ranches around the right and ability to graze cattle on the federal lands. Unfortunately, because of continued federal administrative control of those grazing rights, the very right of western ranchers to hold the grazing rights – and thus continue their livelihoods – has been subjected to judicial review at the behest of special interest litigating groups. In the case at bar, standing has been based on the slightest aesthetic interest in the federal lands.

For example, the Natural Resources Defense Council (NRDC) sued in the Eastern District of California to set aside the Bureau of Land Management's Experimental

Range Stewardship Program. *Natural Resources Defense Council, Inc., v. Hodel*, No. Civ. S-84-616 (E.D. Cal. Sept. 3, 1985). By using an extremely narrow construction of the Public Rangeland Improvement Act, 43 U.S.C §§ 1901-1908 (1982), the court struck down a program designed to use incentives to improve range conditions. The Farm Bureau respectfully submits that it is not appropriate for single issue plaintiffs to be granted standing to attack an experimental program designed to better the efficiency of Executive branch management.[1]

If the court had enforced the rule that programs are not justiciable, then BLM may have been able to develop a better range management system. Instead, the court presumed the failure of the BLM's program and dictated the content of the program to the agency. Moreover, such judicially dictated policy ultimately frustrates the policy of Congress to improve grazing conditions. *See* Huffaker and Gardner, *Rancher Stewardship on Public Ranges: A Recent Court Decision*, 27 NAT. RES. J. 887 (1987) (describing the deleterious effect of judicial intervention in this program).

The NRDC again sued in the Eastern District of California[2] to set aside an executive order setting grazing fees

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[1] Authority for the stewardship program is found at 43 U.S.C. § 1908 (1982).

[2] The above two cases are not the only ones brought in the Eastern District of California. *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985), set aside an important wilderness study program of the Department of the Interior.

for all the public lands.[3] *Natural Resources Defense Council v. Hodel*, No. Civ. S-86-548 (E.D. Cal.). The injury claimed for standing was aesthetic damage caused by a chain of events that allegedly resulted from fees that the NRDC claimed were too low. The court was presented with thousands of pages of economic and technical data and asked to decide the fate of the public lands grazing program, and the court asserted its authority to do so. Ranch families across the West must not live in fear of economic ruination at the hands of single interest claimants who have no economic risk or loss of property rights at stake.

Grazing and grazing fee issues are properly before Congress and congressional oversight committees. The agencies have thousand of personnel to manage the grazing program. Both of these branches of government are ultimately responsible to the public. The environmental groups and the members of the Farm Bureau are constantly arguing their points to these co-equal branches of government. The process is a slow one, as it should be since the survival of western ranch families is at stake. This program has been authorized, funded, and overseen by Congress. The Executive is responsible for administration. There is no need for reshaping by litigation only to accommodate the policy goals of environmental litigants.

Registration and de-registration of agriculture chemicals is of great importance to Farm Bureau members throughout the United States. America's farmers are

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[3] Grazing fees are the rentals charged for grazing on the public lands.

proud of their role in providing abundant and wholesome food for the nation and the world. The chemicals that have played an important role in agriculture cannot be removed or restricted from the market lightly. Both Congress and the Executive have processes whereby those concerned about chemicals can air their concerns and receive appropriate action. Again, the judiciary should not be called upon repeatedly to decide such technical and politically charged questions asserted by environmental litigants.

Yet the judiciary has played a major role – perhaps *the* major role – in shaping the agriculture chemical policies and programs of the Executive. A commentary describes how a series of court decisions rewrote the procedural provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1982), so as to define the substantive content of the program. MacIntyre, *A Court Quietly Rewrote the Federal Pesticide Statute: How Prevalent Is Judicial Statutory Revision?*, 7 LAW & POLICY 249 (1985).

Standing for pesticide cases is in reality based on a harm to the public at large. Such harm is at least as diffuse as the theoretical harm to respondent's member Ms. Peterson in the case at bar. Ms. Peterson might have her aesthetic appreciation of 5,000 acres in Wyoming injured if someone decides to mine there. Likewise, a plaintiff in a pesticide case might contract cancer thirty years from now. Both of these harms are more akin to the injury to taxpayers where this Court has long denied standing. *Frothingham v. Mellon*, 262 U.S. 447 (1923). As in taxpayer cases, this Court should defer to the elected branches of government.

II. FARM BUREAU MEMBERS WHO ARE NEIGHBORS TO THE PUBLIC LANDS ARE DIRECTLY AND ADVERSELY AFFECTED BY THIS SUIT

Apart from the far reaching implications to major government programs upon which Farm Bureau members must rely, this suit directly affects many Farm Bureau members. Many of the western members of the Farm Bureau are neighbors to the public lands. Often historic land ownership patterns have evolved in ways that are inefficient for both the federal land management agencies and the neighboring farms and ranches. To increase efficiency of both public land and private lands, federal land managers and neighboring private owners frequently trade land.

By allowing this suit to be heard, the court placed many completed trades in jeopardy and blocked may others during the time a preliminary injunction was in place. Even now, those trading land must worry that the court or agencies will undo land exchanges.[4]

Hundreds, or perhaps thousands, of land exchanges were blocked on the 180,000,000 acres of federal land involved in this suit.[5] Almost all of those exchanges were

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[4] Section 10 of the Federal Land Exchange Facilitation Act, Pub. L. 100-409, 102 Stat. 1087 (1988) (codified at 43 U.S.C. § 1723 may provide some relief for a few larger future exchanges.

[5] It is impossible to determine the number since many potential applicants were told orally that exchange was impossible on affected lands.

benign to the respondent. Many exchanges, such as those to enhance wildlife habitat, were beneficial to the respondent. The judiciary should not be called upon to block exchanges in all western states based on one person's objection to possible mining damage in one 5,000 acre area in Wyoming.

Land exchanges, and many of the other routine day to day management concerns on the 180,000,000 acres can only rationally be handled by the Executive branch which has the knowledge and staff to handle the thousands of matters that arise. The judicial management of the lands in the case at bar has caused widespread interference with the day to day business relations of Farm Bureau members and federal land managers.

CONCLUSION

The founding fathers wisely assigned policy-making to the Legislative and Executive branches of government. The Executive is intended to have flexibility to efficiently execute the laws Congress passes. The Constitution restricts the Judiciary to resolving actual cases and controversies. Over the past decades the Judiciary has lost sight of this restriction and judicial policy making has seriously impacted the federal programs upon which Farm Bureau members rely. Judicially created policies have hurt farmers in their legitimate use of the public

lands, regulated chemicals, regulated waters, and numerous other objects of government regulation.[6]

The Farm Bureaus urge this Court to grant the writ and examine the role of the judiciary to review programs and policies of federal agencies.

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[6] The great importance of the issue raised in this case to many areas of government and society is set forth at length in J. RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1989).